UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/581
19 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 581

Case No. 618: NARULA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Arnold Kean; Mr. Hubert Thierry;

Whereas at the request of Ashwani Kumar Narula, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 September 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 10 September 1991, the Applicant filed an application containing pleas which read, in part, as follows:

"I. PLEAS

...

11. With regard to additional evidence, the Applicant respectfully requests the Tribunal to call for evidence and for cross-examination:

(a) ..., Chairman Staff Council, United Nations Economic & Social Commission for Western Asia [ESCWA], Baghdad, Iraq (Now functioning temporarily at Amman, Jordan),

(b) The documentation on and the tape recordings of the statements made by the Assistant Secretary-General, OHRM [Office of Human Resources Management], during his meeting

with the staff of the United Nations Economic and Social Commission Western Asia Baghdad Iraq (...),

(c) Appointment and Promotion Board records concerning the selection for the post of Chief, Joint UNIDO/ESCWA Industry Division.

12. On the merits of the case the Applicant requests the honourable Tribunal:

(a) To find...

(iii) That the Applicant had full expectancy of continuation of service with the United Nations as past extensions of his contract had been merely a routine matter;

(iv) That the decision by the Executive Secretary, UNESCWA, on non-extension of the Applicant's contract was arbitrary, was devoid of valid reasons, was grossly discriminatory ... was incorrect and was malafide;

(v) That the said decision was not based on the stated reason of the changing requirements of the UNESCWA region but was due to extraneous reasons and personal interests of Mr. Abdel Jaber, Executive Secretary, ESCWA, and that it was grossly discriminatory;

...

(b) To order the Respondent...

(i) To rescind his decision on non-extension of Applicant's employment contracts;

(ii) To reinstate the Applicant at level L6/DI as Regional Adviser UNESCWA or to offer the Applicant an equivalent post as permanent staff;

(iii) To pay to the Applicant full salary, allowances, benefits, Pension Fund contribution, perquisites and other entitlements for the period between 31 December 1989 and the date the Applicant rejoins the United Nations as per (ii) above;

(iv) to pay compensation equivalent to one year salary for causing injury to the life of the Applicant and that of his family;

(v) To locate official status file of the Applicant."

Whereas the Respondent filed his answer on 15 April 1992;

Whereas the Applicant filed written observations on 24 May 1992;

Whereas, on 21 October 1992, the Applicant submitted an additional statement;

Whereas, on 30 October 1992, the Tribunal put a question to the Respondent and on 12 and 18 November 1992, he provided an answer thereto;

Whereas, on 17 November 1992, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 21 January 1979, on a two month fixed-term appointment as a Senior Economic Affairs Officer at the P-5, step I level at the Joint ESCWA/UNIDO Industry Division. He served in that capacity on a succession of fixed-term appointments until 30 September 1979. On 1 October 1979, he received a one year project personnel appointment at the L-5, step I level, as a Regional Adviser. He then served on a series of fixed-term project personnel appointments of varying duration until 31 December 1989, when he was separated from service at the L-5, step X level.

According to information from the Chief of its Division of Administration Services, ESCWA evaluates the services of Regional Advisers annually to determine whether appointments should be extended or not. The main criteria in the evaluation "apart from performance" is the "extent to which ESCWA member countries had requested services of a particular Regional Adviser". In November 1989, a Committee chaired by the Executive Secretary, met to review the services of the Regional Advisers and approved one-year extensions of appointments for nine Advisers, a six-month extension for another Adviser and the non-renewal of the appointments of the Applicant and of an Iraqi national who had reached the mandatory age of separation from

service. The Chief, Division of Administration Services, stated that only two requests had been made for the Applicant's services for the previous two years, both from Oman, in 1988 and 1989.

The Applicant asserts that on 27 November 1989, "an hour before [he] was to leave for the airport to board the plane for Muscat" to conduct a training workshop, he received a memorandum dated 23 November 1989, from the Executive Secretary, in which he advised the Applicant that:

> "In light of a thorough assessment of the priority needs of the ESCWA Member States and the available resources to meet these needs, I regret to inform you that it has been decided to limit your appointment up to the expiration of your present contract at the end of December 1989."

On 20 December 1989, the Applicant requested the Secretary-General to review the administrative decision not to extend his appointment beyond 31 December 1989. In a further letter dated 26 December 1989, the Applicant stated that the reason for the non-extension of his appointment by the Executive Secretary and for "the haste" with which his post had been vacated, was "to create a place for a country compatriot of the Executive Secretary who has been given a short-term contract as 'Officer-in-Charge, Industry Division' and who is also an external candidate for the post of Chief, Industry Division."

On 29 March 1990, the Director, Staff Administration and Training Division, Office of Human Resources Management, informed the Applicant that the decision not to extend his appointment would be maintained.

On 21 March 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 26 March 1991. Its conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 50. The Panel did not find that the appellant had sustained the burden of proof for his allegations that the decision not to renew his fixed-term appointment was improperly motivated.
>
> 51. The Panel found that, at the time of the decision not to renew his appointment, the appellant had, if not a legal expectancy of continued employment, then at least a reasonable expectation of renewal of his fixed-term appointment for one

year or of an earnest search by the Respondent for equivalent alternative employment. The Panel further found that such a search had not been made.

52. The Panel recommends that the appellant be paid compensation equal to six months net base salary at the rate in effect at the time of his separation from the service.

53. The Panel recommends that the appellant not be required to make any refund on account of any advance or advances received by him against education grant for 1989-1990 and that any refund he may have made on that account be restituted to him.

54. The Panel found the appeal not receivable as far as it concerned the failure to promote the appellant or to revise his salary."

On 12 April 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed him that:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided to maintain the contested decision and to accept, in view of the particular circumstances of your case, the Board's unanimous recommendation that you be paid compensation in an amount equivalent to six months' net base salary at the rate in effect at the time of your separation from service.

The Board has also unanimously recommended that you not be required to make any refund on account of any advance or advances received by you against the education grant for 1989-1990 and that any refund you may have made on that account be restituted to you. Taking into account in this regard the following facts and considerations:

(a) that you did not raise in your appeal the question of payment of the education grant;

(b) that an education grant advance of US$6,250 was given to you in July 1989 for the school year in question and was deducted in its totality from your final payments;

(c) that there is no record in the finance files of ESCWA presently available of settlement of an education grant claim for any part of the school year 1989/90;

(d) that under the staff rules you would have no entitlement to the education grant in respect of the second half of the school year 1989/90, which followed your separation from service, the Secretary-General has decided not to accept the Board's second recommendation as it relates to the second half of the school year 1989/90. With regard to the first half of the school year 1989/90, if a timely claim accompanied by written evidence of the child's attendance, education costs and amounts paid by you was submitted, the appropriate amount should be restituted to you if this has not been done."

On 10 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy of continued employment with the Organization.

2. The decision not to extend the Applicant's appointment was grossly discriminatory and was designed to accommodate a personal friend and compatriot of the Executive Secretary.

3. The Applicant was the only non-Arab among the 12 Regional Advisers and the only one whose contract was not extended.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of continued employment upon the expiration of his fixed-term appointment. The Applicant was granted every reasonable consideration for a further appointment.

2. The decision not to renew the Applicant's appointment was not motivated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 27 October to 19 November 1992, now pronounces the following judgement:

I. The Tribunal has before it sufficient evidence to decide this case without an oral hearing.

II. The Respondent has accepted the unanimous finding of the Joint Appeals Board (JAB) that the Applicant had a reasonable expectancy of further employment after the expiration of his current one-year fixed-term contract, and that he should be paid six months net base salary, as compensation for the failure to employ him for a further year or search for suitable employment for him. Accordingly, the question whether the Applicant had an expectancy of further employment does not arise for decision by the Tribunal.

III. The JAB also recommended that the Applicant should not be required to refund any part of the advance received by him in respect of an education grant for 1989-90 and that any such refund he may have made be restituted to him. The Respondent did not accept this recommendation but agreed to the restitution to the Applicant of the education grant in respect of the first half of that school year, on production of the required evidence. In view of the reasons advanced by the Respondent, the Tribunal concurs in this decision.

IV. The Applicant alleges that the Executive Secretary's decision not to extend or renew his contract of employment was prejudiced and discriminatory. It was, he contends, nepotism motivated by a desire to find a place for a compatriot of the Executive Secretary, by professional jealousy and also by a desire to eliminate from the cadre of Regional Advisers, the only one who was not an Arab.

V. According to the jurisprudence of the Tribunal, the burden of proving prejudice or discrimination rests on the party asserting it. (Cf. Judgement No. 93, Cooperman). The Applicant has not, in the opinion of the Tribunal, discharged this burden in respect of the allegations of nepotism and professional jealousy.

VI. So far as concerns the alleged prejudice of the Executive Secretary against non-Arabs, he is alleged to have said openly that ESCWA is a regional Arab organization in which non-Arabs have no place. The Respondent has not denied this allegation. Furthermore, the Applicant was the only non-Arab among the cadre of 12 Regional Advisers and the only Regional Adviser whose contract was not renewed, apart from one Iraqi who was approaching the age of retirement.

The Executive Secretary's decision not to renew the Applicant's contract, therefore, had the effect of eliminating the only non-Arab from the cadre.

VII. The Tribunal has considered the Respondent's argument that the Applicant's contract was not renewed because of a reduced demand for his services. His expertise lay in engineering, production and maintenance, according to the Respondent, whereas the demand was for assistance in trade and marketing. In consequence, there were only two requests for his services during the previous year, both of them from the Sultanate of Oman. However, the Applicant contends, in support of his allegation of prejudice against non-Arabs, that an Arab colleague with a similar professional background had his contract renewed, having received requests for his services from six Arab States. Although the Tribunal cannot substitute its judgement for that of the Administration as to the need for the employment of particular experts in particular fields, conduct which may be relevant to claims of prejudice may be considered by the Tribunal.

VIII. Concerning the allegation of prejudice by the Executive Secretary against non-Arabs, the Tribunal asked Counsel for the Respondent to provide information as to the Executive Secretary's previous pattern of conduct in appointing Regional Advisers. The information supplied shows that, during Mr. Abdel-Jaber's tenure as Executive Secretary of ESCWA, that is to say from April 1990 to November 1992 inclusive, a period during which the Applicant had made known his interest in a further appointment as Regional Adviser, as well as in a permanent position, six Regional Advisers were appointed, five of Jordanian nationality and one of Iraqi nationality. No non-Arabs were appointed. Under the circumstances of this case, the Tribunal finds that the Applicant has made a prima facie case that his being a non-Arab influenced the decision of the Executive Secretary, and concludes that the Respondent has not sufficiently dispelled the inference of prejudicial behaviour against the Applicant.

IX. Taking into account the foregoing considerations, the Tribunal decides that the Applicant shall receive, in addition to the compensation of six months net base salary recommended by the JAB and agreed to by the Respondent, a further six months net base salary at the rate in effect on the date of his separation from the service.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of six months of his net base salary at the rate in effect on the date of his separation from the service.

XI. The Tribunal also expresses the wish that the Respondent should find further employment for the Applicant on the staff of the United Nations or an Agency thereof, appropriate to his qualifications and experience.

XII. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Presiding

Arnold KEAN
Member

Hubert THIERRY
Member

New York, 19 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/582
20 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 582

Case No. 614: NEUMAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas, on 12 August 1991, Lawrence Neuman, a former staff member of the United Nations, filed an application containing pleas that read as follows:

"II. Pleas

(1) To declare the present appeal receivable;

(2) To adjudge that the decision of summary dismissal was procedurally flawed because the letter of summary dismissal was signed by the Assistant Secretary-General for Human Resources Management instead of the Under-Secretary-General for Administration and Management contrary to paragraph 4 of ST/AI/234/Rev.1.

(3) To find that the Administration's categorization of the Applicant's use of a photocopier and voluntary activities as an 'exceptional and urgent' case which warranted summary dismissal was a flagrant abuse of discretionary authority.

(4) To adjudge and declare that the Administration ignored the intent of the General Assembly in changing the Staff Rules and circumvented the process whereby a sanction commensurate with the gravity of the misconduct could be applied.

(5) To rule that the decision of the Administration to summarily dismiss the Applicant was improperly made because the Administration ignored a prior Judgement of the Administrative Tribunal, Judgement 491, which addressed circumstances which were similar to those of the Applicant.

(6) To declare that the procedure which should have been followed in the Appellant's case would have been to refer the matter to the Joint Disciplinary Committee where he would have been given the benefit of a hearing before any further action was taken.

(7) To find that the decision to summarily dismiss the Applicant was unjustified because there was no evidence of patent misconduct and the acts with which he was charged were not such as would properly be characterized as 'serious misconduct' requiring immediate separation from service.

(8) To rule that the decision to summarily dismiss the Applicant was tainted with prejudice as the Applicant's explanations were not given any credence by the Administration.

(9) To adjudge and declare that even when allegations against the Applicant were viewed in the light least favourable to the Applicant, they did not constitute conduct so injurious to the Organization that the staff member had to be separated from it without the process due under staff rule 110.4, and that consequently the Applicant was denied due process.

(10) To find that the Applicant was treated in an arbitrary and discriminatory manner which precluded any independent determination of the facts and an assessment as to whether or not there was misconduct.

(11) To order the Respondent to pay the Applicant damages in the amount of six years of net salary, considering the exceptional seriousness of the violations committed in the present case, for violation of the terms of his permanent appointment, for lack of due process, for discrimination, for abuse of discretionary authority, for the devastating effect upon the Applicant's professional career, and for the hardship and suffering which were inflicted upon the Applicant and his family."

Whereas the Respondent filed his answer on 10 March 1992;

Whereas the Applicant filed written observations on 7 April 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 June 1973, on a short-term appointment for one month at the P-3 level, as a Scientific Affairs Officer in the Ocean Economics and Technology Branch/Resources and Transport Division of the Department of Economic and Social Affairs. He then served on a two year fixed-term appointment through 30 June 1975, that was converted to a probationary appointment with effect from 1 February 1975. He received a permanent appointment on 1 November 1975. On 1 April 1977, the Applicant was promoted to the P-4 level. Until his dismissal on 22 May 1990, the Applicant remained in the same Department and, from 1988, served in the Energy and Resources Branch of the Office for Development Research and Policy Analysis.

On 21 February 1990, the Director of the General Analysis and Policy Division wrote to the Applicant concerning his "excessive use of the photocopying machine for non-United Nations matters", which had been brought to his attention, including the "most recent instances" that had occurred on 15 and 17 February.

On 3 April 1990, the Director of the Staff Administration and Training Division, Office of Human Resources Management (OHRM), wrote to the Applicant advising him that he was charged with serious misconduct. He referred to the use of the photocopy machine and noted that some of the pages found in the copy room indicated that he was "conducting, from United Nations premises, an independent commercial activity". Also, he had listed as one of his "qualifications as President and Chief Executive Officer and Director [his] experience 'as senior officer of the United Nations (1973-present)', having 'advised on matters relating to both conventional and renewable energy.'" He further noted that:

> "In conducting a private business related to your official functions from United Nations premises, using United Nations property and facilities, you have violated a number of your duties and obligations as an international civil servant ... You did not request the prior approval of the Secretary-General before engaging in outside occupation, as required by staff rule 101.6(a), and failed to abide by the prohibition contained in staff rule 101.6(b) against staff members being actively associated with the management of any business concern if it were possible for the staff member to

> benefit from such association by reason of his or her official position with the United Nations."

The Applicant was asked "to make, within 10 working days of the receipt of this memorandum, any comments or explanations [he] may wish to offer".

In a reply dated 12 April 1990, the Applicant stated, inter alia, that the "allegations of misconduct are unfounded". He also admitted having used the photocopying facilities, denied that this activity interfered with the work of other staff members and also denied that he was conducting a private business from UN premises. He stated in this regard:

> "... I am not conducting any independent commercial activity from United Nations premises. ...
>
> As an investor in PRC [Pinnacle Resources Corporation], I was given the title of President and Director of The Pinnacle Resources Corporation on a pro bono basis. I serve in that capacity on a voluntary basis and receive no salary, remuneration or material benefit from my service in the company."

On 1 May 1990, the Assistant Secretary-General, OHRM, recommended to the Secretary-General, that the Applicant be summarily dismissed for serious misconduct on the following grounds:

> "a. ... that [the Applicant] knowingly used UN premises and property for a private purpose in violation of staff regulation 1.1...;
>
> b. ... that [the Applicant] engaged in outside activities in violation of staff regulation 1.2;
>
> c. ... that he did so without requesting prior approval as required by staff rule 101.6(a);
>
> d. ... that [the Applicant] was actively associated with the management of, or held a financial interest in, a business concern despite the existence of a possibility that he would benefit from such association or financial interest by reason of his official position with the United Nations, in violation of staff rule 101.6(b), and that he did not declare his interest in that business concern in violation of staff rule 101.6(c);"

He concluded "that such acts constitute serious misconduct" and recommended that the Applicant "be summarily dismissed for serious misconduct under staff regulation 10.2, second paragraph."

On 22 May 1990, the Assistant Secretary-General, OHRM, informed the Applicant of the Secretary-General's decision that he "be summarily dismissed for serious misconduct, in accordance with the second paragraph of United Nations staff regulation 10.2", effective as of the close of business on that date. He explained that the Secretary-General's decision was based on the grounds listed above.

In a letter dated 28 June 1990, to the Secretary of the Joint Disciplinary Committee (JDC), the Applicant requested that the decision to summarily dismiss him be reviewed by the JDC, in accordance with staff rule 110.4(c). The JDC submitted its report on 14 December 1990. Its conclusions and recommendation read as follows:

"V. Conclusions and recommendation

16. Accordingly, the Panel concludes that the procedure which was followed was not proper in the circumstances. The staff member was charged with having committed certain acts - the facts and the nature of which were in dispute. Even when these allegations were viewed in the light least favorable to the staff member, they did not constitute conduct so injurious to the Organization that the staff member had to be separated from it without the process which is due him under staff rule 110.4.

17. Instead, the procedure which should have been followed in this case would have been to refer the matter to the Joint Disciplinary Committee. There would have been the opportunity for that body to make an independent determination of the facts and to make an assessment as to whether there was misconduct in this case. If it had determined that misconduct had occurred, it then could have recommended a sanction which it considered commensurate with the gravity of the misconduct.

18. Accordingly, the Panel recommends that the appellant be reinstated, and that he be paid moral damages in an amount equal to three months' net base salary as compensation for the summary dismissal, which was improper. The Panel further recommends that if the appellant is not reinstated, he should receive payment of compensation in an amount equal to two years' net base salary, which would include moral damages."

On 14 February 1991, the Under Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined the case in light of the JDC report, had "decided not to accept its recommendations and to maintain, therefore, the decision to summarily dismiss" him.

On 12 August 1991, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The authority to dismiss staff has not been delegated to the Assistant Secretary-General, OHRM, and therefore the decision to dismiss the Applicant was invalid.

2. The characterization of the use of a photocopier and the Applicant's voluntary activities as warranting summary dismissal was an abuse of discretionary authority.

3. The Respondent should have referred the matter to the JDC. In not doing so, he violated his own rules and procedures.

4. The decision to summarily dismiss the Applicant was tainted with prejudice.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant was properly taken by the Acting Under-Secretary-General for Administration and Management on behalf of the Secretary-General. The fact that the Assistant Secretary-General for Human Resources Management communicated this decision to the Applicant did not affect its validity.

2. The Secretary-General has broad discretion with regard to disciplinary matters. This includes a determination of what constitutes serious misconduct warranting summary dismissal. The Secretary-General's decision to summarily dismiss the Applicant for his unauthorized engagement in outside activities and use of UN premises and property for private purposes, was a valid exercise of that discretionary authority. It was not vitiated by mistake of fact, lack of due process, by prejudice or by any other extraneous factors.

The Tribunal, having deliberated from 29 October to 20 November 1992, now pronounces the following judgement:

I. The Applicant has listed 11 pleas: the sum and substance of which are that the alleged facts of wrong-doing on his part did not justify summary dismissal, that the procedure followed by the Respondent in concluding that the Applicant was guilty of serious misconduct deserving summary dismissal was faulty in numerous ways and totally indefensible, that the Respondent's attitude and decision were discriminatory, and finally that the punishment inflicted was not commensurate with the offence.

II. In view of all the mistakes allegedly committed by the Respondent and the consequent injuries suffered by the Applicant, he asks for six years' net salary. Before the Joint Disciplinary Committee (JDC) the Applicant proposed, as an alternative to reinstatement, "damages in the amount of three years net salary for lack of due process, hardship and suffering".

III. The Tribunal finds it necessary to state, at the outset, that in disciplinary cases it has always held that the Secretary-General can exercise broad discretionary powers, including the power to dismiss a member of the staff for serious misconduct. The Tribunal has consistently refused to interfere with the exercise of this power by the Secretary-General, unless it can be shown to have been tainted by bias or prejudice or other extraneous factors. Furthermore, the Tribunal's jurisprudence has established that if the Secretary-General concludes, after proper examination, that a staff member's conduct is unsatisfactory, he may impose any of the disciplinary measures prescribed in staff rule 110.3.

IV. The Applicant does not question the discretionary power of the Secretary-General, as described by the Administrative Tribunal, but avers that the issue of how that authority should be exercised has been addressed. The Applicant refers to discussions in the General Assembly and elsewhere which were meant, in his view, to show how such discretionary powers should be exercised.

V. Whatever might be the nature of the discussions on this subject, the Tribunal is bound by the Staff Regulations and Rules, and neither national laws nor speculations on what the General Assembly might or might not have intended can detract from the substantive provisions of relevant Regulations and Rules. Staff rule 110.4, dealing with "due process", makes it amply clear that no advice from a JDC shall be required "in respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service". The rule further provides that, after the advice of the JDC has been received, "the Secretary-General shall decide as soon as possible what action to take in respect thereof."

VI. In this case, the assistance of the JDC was not invoked by the Respondent, but, at the request of the Applicant, a JDC was constituted. In its report dated 14 December 1990, the JDC criticized the procedure followed and stated in paragraph 17:

> "17. Instead, the procedure which should have been followed in this case would have been to refer the matter to the Joint Disciplinary Committee. There would have been the opportunity for that body to make an independent determination of the facts and to make an assessment as to whether there was misconduct in this case. If it had determined that misconduct had occurred, it then could have recommended a sanction which it considered commensurate with the gravity of the misconduct."

VII. The JDC does not offer any explanation why it did not itself "make an independent determination of the facts" and forward such recommendation as might have appeared appropriate in the circumstances. The JDC found that the allegations by the Respondent, even if they could be established as correct, were not such as to warrant immediate separation from service. The JDC was entitled to its opinion, but the Respondent, after considering the advice given to him by the JDC, maintained his decision to dismiss the Applicant summarily. The Applicant has come to the Tribunal to appeal against this decision of the Secretary-General. The JDC's recommendation is advisory, as indeed is recognized by the Applicant, when he concluded his request for the review by the JDC of his summary dismissal, dated 28 June 1990, with the following sentence:

> "In the event that the Joint Disciplinary Committee should make a unanimous recommendation upon my case, I would be most grateful if the Under-Secretary-General for Administration and Management would consider accepting that recommendation in the same way that he accepts unanimous recommendations made by the Joint Appeals Board.

VIII. A few relatively less important points may be disposed of at this stage. The case is clearly receivable and the complaint that the letter of dismissal was signed by an Assistant Secretary-General rather than by an Under-Secretary-General, need not be pursued; there is evidence that the decision was approved by the Secretary-General and the letter of dismissal of the Applicant on 22 May 1990, was endorsed by the Acting Under-Secretary-General. Similarly, the Tribunal does not consider the delay, caused by sending the JDC report to the Applicant at the wrong address, as material. The Tribunal also notes that the considerations and conclusions of the case of Murthy (Judgement No. 491), cited by the Applicant in support of his case do not apply to the present case.

IX. No evidence of bias or prejudice has been adduced, except that the Applicant asserts that the reference to two past incidents by the Respondent - one relating to medical insurance and another to tax reimbursements - are discriminatory and prejudicial. The Respondent seems to claim that these references form "background" necessary to decide the suitability of the Applicant for further service with the United Nations. The Tribunal takes the view that the totality of a staff member's record should be carefully considered by the Secretary-General before he reaches any conclusion on whether the seriousness of the misconduct warrants immediate separation from service. The Tribunal therefore finds that a study of the Applicant's record does not violate any of his contractual rights.

X. The principal contentions of the parties revolve around the incidents on 15 and 17 February, the latter being a Saturday - not a normal working day. When the Applicant was first informed on 21 February 1990, of these incidents, he kept quiet although he was told "that your abuse of office facilities for personal activities is, to say the least, highly improper" and that "secondly, I should like to call your attention to staff rule 101.6

regarding involvement of staff members in outside activities." The Tribunal finds the Applicant's silence for about seven weeks inconsistent with the total innocence he claimed on 12 April 1990, when he replied to the formal charge made against him by the Respondent on 3 April 1990. His letter of 12 April 1990, does not, moreover, make any significant comments on the abuse of office facilities.

XI. What is in dispute is not so much the volume and extent of this abuse as the nature of the material photocopied and what it purported to show, although the Applicant hints that other people besides himself or his wife could have used the photocopying room on the dates in question. On 11 April 1990, two letters were addressed to the Director, Staff Administration and Training Division, OHRM, one from a former staff member of the UN, and another from a partner in a firm of certified public accountants. The purpose of both letters was to provide evidence that the Applicant had no financial interests in the "Pinnacle Resources Corporation" for whose promotion the facilities of the United Nations were allegedly used widely by the Applicant.

XII. There has been much discussion about the nature of the Applicant's activities outside the UN, the use of his position in the UN for encouraging these activities and of whether he had any current or potential financial interests in these activities. On 1 May 1990, a detailed memorandum was sent by the Assistant Secretary-General, OHRM, to the Secretary-General, recommending summary dismissal of the Applicant. In paragraph 8 it stated:

> "All due process requirements have been respected. Mr. Neuman received a detailed statement of charges in the Allegations of Serious Misconduct he received on 6 April 1990. He was asked to comment within ten working days of receipt of the Allegations and did so on 12 April 1990. He was informed of his right to obtain the assistance of counsel. The misconduct is serious and patent; the facts are established and there is no need to refer the matter to a Joint Disciplinary Committee."

XIII. A careful reading of the memorandum and of the submissions, together with the comments later made by the Applicant at different stages, convinces the Tribunal that, in the present case, the Secretary-General properly exercised his broad discretion with regard to disciplinary matters. The Tribunal notes that the Secretary-General had yet another opportunity to review the case when the report of the JDC was made available. The gravamen of the Applicant's complaint is that the Respondent's attitude and conclusion are based on unjustified inferences. The Tribunal finds nothing on record to uphold this contention of the Applicant. The interpretation given by the Respondent to the disclosed facts would seem sound, especially as the Tribunal has concluded that no prejudice or discrimination has been established. Indeed, the Applicant has not given any reasons for assuming that bias, discrimination or other extraneous factors might have influenced the Respondent's decision to summarily dismiss the Applicant for serious misconduct.

XIV. The Applicant considers that the punishment imposed on him was disproportionate to his offence, if any. In the exercise of his discretionary power in this respect, the Secretary-General apparently decided that the activities of the Applicant were sufficiently objectionable to warrant summary and immediate dismissal; presumably this was the reason why the JDC was not invoked. Whatever might have been the arguments, all these matters are essentially within the discretionary power of the Secretary-General. Furthermore, the Tribunal finds that there have been no unusual delays at any stage in the handling of this case.

XV. It was within the Secretary-General's power to conclude that because the Applicant, who had been with the UN for 17 years and was holding a post requiring a high degree of responsible conduct, was using his UN position, connections and facilities to further his private and, presumably, financial interests, prompt action was necessary.

XVI. For the foregoing reasons, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

New York, 20 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/583
20 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 583

Case No. 622: DJIMBAYE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas at the request of Nestor Nadjidoumdé Djimbaye, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 September 1988, the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 December 1989, the Tribunal suspended, under article 7, paragraph 5 of its Statute, the time-limit for the filing of an application until 30 April 1990;

Whereas at the request of the Applicant and with the agreement of the Respondent, the President of the Tribunal extended to 31 July, 31 October 1990, 31 January and 31 March 1991, respectively, the time-limit for the filing of an application;

Whereas at the request of the Applicant, the Tribunal suspended, under article 7, paragraph 5 of its Statute, the time-limit for the filing of an application until 30 September 1991;

Whereas, on 30 September 1991, the Applicant filed an application containing the following pleas:

"II. PLEAS

8. With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;

(b) To find that the present application is receivable under article 7 of its Statute.

9. On the merits, the Applicant respectfully requests the Tribunal:

(a) To find that the decision to dismiss the Applicant was based on errors of facts;

(b) To find that there were procedural irregularities which vitiated the decision to dismiss the Applicant;

(c) To find that the decision to dismiss the Applicant was arbitrary;

(d) To find that there was abuse of discretionary power;

(e) To order the Respondent to rescind his decision to dismiss the Applicant in line with article 9 of its Statute, and further,

(f) To order the appropriate amount of compensation [to] be paid to the Applicant for the injury sustained by him by the lack of due process and excessive delays;

(g) To order that appropriate termination indemnity be awarded Applicant."

Whereas the Respondent filed his answer on 16 January 1992;

Whereas the Applicant filed written observations on 10 February 1992;

Whereas, on 20 October 1992, the Applicant submited an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 26 June 1977. He served as an Associate Social Affairs officer, at the Social

Development Division of the Economic Commission for Africa (ECA), in Addis Ababa, on a probationary appointment. On 1 June 1979, his appointment was converted to a permanent appointment and on 1 April 1980, he was promoted to the P-3 level. On 3 January 1986, the Applicant was dismissed for misconduct.

The Applicant, being an international recruit, was entitled to an education grant in respect of each child in full-time attendance at a school, university or similar educational institution. Education grant payments are calculated on the basis of certificates of attendance and fees, bearing the seal of the school and signed by one of its representatives and indicating the dates of the child's attendance and the amounts actually paid to the institution. These, in turn, are certified by the staff member, as being true to the best of his or her knowledge and belief, on the "Request for settlement form". Education grants are paid on the basis of this double certification.

In August 1981, the Applicant submitted claim forms to justify advances paid to him by the Organization for education grant benefits for the 1980-81 school year for three of his children (Kaltouma Alphonsine, Philomene and Marie-Louise) who were allegedly studying in Cameroon. In support of his claim, he submitted certificates of attendance and stamped receipts from the Ecole Primaire Catholique Nkol-Ewé and from the Ecole Notre-Dame de Mimetala, located in Yaoundé, Cameroon for a total of CFA 1,334,000 (approximately US$4,500).

On 23 October 1981, the Director of Administration and Conference Services wrote to Applicant questioning the accuracy of the claims and the supporting documentation he had submitted.

In a reply dated 27 October 1981, the Applicant admitted that he had spent the sums claimed and further stated that those expenditures did not appear to "respect" the principles of the education grant scheme. He would, accordingly, reimburse the amount of the advance. A repayment schedule was arranged by the Administration and explained to the Applicant in a memorandum dated 6 November 1991, from the Director, Division of Administration and Conference Services.

On 26 November 1981, the Applicant explained that he had used the grant advance properly, as it had been used for education, although not as claimed.

In response to an enquiry of the Administration dated 17 February 1982, officials from the schools which the Applicant's children had allegedly attended, certified that the Applicant's children had not been enrolled in the schools during the school year 1980-1981, that their fee scales were not as claimed by the Applicant and that the receipts submitted by the Applicant were false.

On 25 May 1982, the Chief of Personnel asked the Applicant for his comments. In a reply dated 28 May 1982, the Applicant referred the Chief of Personnel to his prior communication to the Director, Division of Administration and Conference Services. He also stated that he had paid for the education costs of his children residing in Europe.

On 18 June 1982, the Chief of Personnel wrote to the Applicant asking him to confirm that his children did not attend the Yaounde schools for which he had claimed an education grant. In a reply dated 23 June 1982, the Applicant asserted that the receipts had been given to him by the school and that the evidence assembled by ECA was not "conclusive" evidence that his children did not attend the school.

On 30 June 1982, the Chief, Personnel Section informed the Applicant that he was "inclined to conclude that [the Applicant] knowingly defrauded the Organization by claiming and receiving sums to which [he] knew [he was] not entitled by presenting false documents. Accordingly, the Administration was proceeding to prepare a final report on the case which would be sent to him for comments under paragraph 3(d) and (e) of PD.1/76 [Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva]". In a letter dated 20 July 1982, the Applicant wrote to the Assistant Secretary-General for Personnel Services, explaining his version of the facts and his interpretation of the education grant advances.

On 7 November 1983, the Chief, Personnel Section informed the Applicant that the Executive Secretary had decided to appoint an ad hoc Disciplinary Committee to investigate the allegations of fraud in connection with the education grant claims he had made for the 1980-81 school year. He also advised him of the specific charges and provided him with a copy of PD/1/76.

After conducting its investigation, the ad hoc Committee adopted a report in which it concluded and recommended as follows:

"28. After carefully examining all the material before it, the Committee made the following findings and conclusions:

a) It was established beyond doubt that Mr. Djimbaye's three children, namely, Khaltouma Alphonsine, Marie-Louise and Philomene were not enrolled and did not attend the said schools in Cameroon during the school year 1980-1981. In fact they were not in Cameroon at all during that period. Mr. Djimbaye himself admitted this fact in both his written and oral evidence (...). Therefore, the Committee concludes that by submitting a claim relating to such schools, Mr. Djimbaye committed a breach of the rules, regulations and procedures governing education grant.

b) The school attendance certificates and the receipts which had been presented by Mr. Djimbaye to support his claim for education grant for 1980-1981 for the said three children had been signed by someone else (believed to be the former Director of the school) who was not authorized to do so. His argument that he was not aware of the change (...) is not acceptable to the Committee because it is our view that [an individual] who was at that time working in the Ministry of Works of the Government of Cameroon and who acted on his behalf, was in fact in a position to know [sic] verify the authenticity of the school management before obtaining their signatures on the documents.

c) Mr. Djimbaye appears in fact to have colluded with [that individual] who in turn appears to have colluded with someone else (believed to be the former director of the school) in order to obtain unauthorized signatures to support his claim. He was also fully aware of this fact. The Committee could not therefore accept his explanation that he was forced by the Personnel Section [the Chief, Personnel Services] and [a staff member of OPS] (...) to submit certificates and receipts from the school where it was known the children never attended during the school year 1980-1981.

d) Mr. Djimbaye had received an advance of US$4,500 against the education grant for 1980-1981 which was far in excess of the total actual school fees normally charged by the schools in Paris (for Khaltouma Alphonsine) and in Addis Ababa (for Marie-Louise and Philomene). It is the view of the Committee that he therefore wilfully attempted to absorb or cover this advance by submitting an education grant claim which was supported by (i) attendance certificates which were signed by an unauthorized person who was in any case not an official of the school; (ii) receipts that were not of the school claimed by Mr. Djimbaye but were signed by the same person; and (iii) by stamps which were not the official stamps of the school. In fact, it is the opinion of the Committee that the three receipts appear to be written by the same person although relating to two different schools. To the extent that this was so, there was an attempt to defraud the Organization.

e) The fees claimed by Mr. Djimbaye for that year were, from the evidence gathered, definitely much higher than was actually the case in Cameroon. However, the Committee is of the opinion that since the children were not in Cameroon during the school year in question, the amount of the fees claimed by Mr. Djimbaye bears no material fact [sic] to this case. The deciding factor being that such claim was at all made for schools not attended by the children and that the amounts claimed by him were much higher than what he had actually paid for the education of his three children in the school year 1980-1981 for the school in Paris (Khaltouma Alphonsine) and in Addis Ababa (for Marie-Louise and Philomene).

29. In the light of the above facts the Committee does not accept Mr. Djimbaye's explanations or counter-charges against [the Chief, Personnel Services] and [a staff member of OPS] as constituting mitigating circumstances that forced the staff member to submit falsified receipts and certificates of attendance to support his education grant claim. Accordingly, the Committee upholds the charges made against the staff member by the Division of Administration and recommends that appropriate disciplinary action be taken against him."

On 14 August 1984, the Chief, Personnel Section, based on the ad hoc Committee's report and the Applicant's observations thereon, recommended to the Executive Secretary that the Applicant be dismissed for misconduct. On 23 August 1984, the Executive Secretary endorsed this recommendation.

On 6 November 1985, the Under-Secretary-General for Administration and Management, after review of the material transmitted to Headquarters by ECA on 31 August 1984, recommended to the Secretary-General that the Applicant be dismissed for misconduct, as a disciplinary measure, according to staff rule 110.3(b).

On 11 December 1985, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to dismiss him, for misconduct, as of the date of receipt of this communication, as a disciplinary measure, under staff rule 110.3(b).

On 24 January 1986, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 23 May 1988, the Board adopted its report. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

57. The Panel unanimously

1. Finds that the administrative decision of the Secretary-General to dismiss the appellant for misconduct for submitting fraudulent education grant claims was justified on the basis of the available conclusive evidence.

2. Finds that the appellant's procedural rights to due process had been duly observed and that every effort was made to ensure his rights of defense in giving him the opportunity to avail himself of the assistance of counsel under Personnel Directive PD/1/76 of 1 January 1976 and establishing and ad hoc Disciplinary Committee to investigate the charges, and

3. Finds that the appellant has not produced any convincing evidence that the procedure against him and the Secretary-General's decision had been tainted by prejudice or improper motivation.

58. Therefore, the Panel unanimously decides to make no recommendation in support of the appeal.

Special Remarks

59. The Panel regrets that excessive delays had slowed down the whole procedure contrary to the interests of the appellant and of the Organization e.g. more than one year between the communication, of 30 June 1982, from the Chief of Personnel Section, ECA, and the first meeting of the ad hoc Disciplinary Committee (15 November 1983), more than six months between the date when the Executive Secretary, ECA, received the report of the ad hoc Disciplinary Committee (15 December 1983) and the date when his recommendation and other documents were sent to Headquarters (31 August 1984) and more than one year between that action and the letter of the Assistant Secretary-General for Personnel Services transmitting the decision to dismiss the appellant (11 December 1985)."

On 31 May 1988, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General, having reviewed his case in the light of the JAB report, had decided to maintain the decision to dismiss him for misconduct consisting of submitting fraudulent education grant claims.

On 30 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to dismiss the Applicant was tainted by prejudice and based on mistakes of fact and errors of law.

2. The failure by ECA to follow correct procedures deprived the Applicant of his right to due process of law.

3. The ad hoc Committee which investigated the Applicant's case did not properly take account of his explanations of the facts.

Whereas the Respondent's principal contentions are:

1. The UN Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standard of integrity. Therefore, he has the responsibility of determining definitively whether a staff member meets those standards.

2. The decision to dismiss the Applicant was properly reached after a procedure which afforded due process and safeguarded Applicant's rights.

The Tribunal, having deliberated from 29 October to 20 November 1992, now pronounced the following judgement:

I. The basic question in this case is whether the Applicant deliberately and falsely claimed education grants in respect of three of his children in order to obtain a financial benefit and so defraud ECA where he was working. The Applicant asked for the payment of education grants much in excess of legitimate charges of the two schools at Yaoundé (Cameroon) where the three children were supposed to have studied in the school year 1980-1981, but they did not in fact attend any schools in Yaoundé in that year. The Applicant's claims were considered by the Respondent as based on false and fabricated certificates of attendance and receipts.

II. The Applicant did not entirely deny that he had made wrong claims supported by false documents, but offered a variety of explanations why he did so. He expressed his willingness to pay back whatever was considered inadmissible and proceeded to make claims regarding other sums owing to him by ECA; these are however not before the Tribunal. A study of the file shows that the attitude of the Applicant was much influenced by what he considered to be due to him.

III. In his numerous explanations, the Applicant referred to the political situation in Chad (his home country) and in Ethiopia where he was working, which compelled him, from time to time, to change the schooling pattern of his children. The voluminous details he provided do not give the Tribunal a clear picture of what happened at different stages, even if the lack of clarity could be considered, to some extent, as due to the passage of time.

IV. In any event, all these developments, and the administrative and legal questions connected with them, were carefully examined, not only by the Respondent, but by the ad hoc Joint Disciplinary Committee (JDC) and by the

Joint Appeals Board (JAB). They all came to the same conclusion, i.e. that the Applicant was guilty of misconduct and thus liable to disciplinary measures, as may be determined by the Secretary-General. The Secretary-General decided to separate the Applicant from service, with effect from 3 January 1986.

V. The Applicant pleads that the findings of the Respondent, as well as of the JDC and of the JAB, were vitiated by an erroneous assessment of the facts, by a series of procedural irregularities which had the effect of denying the Applicant the protection of the Staff Regulations and Rules and by prejudice or malice on the part of some of his colleagues in ECA. Finally, he contends that, in any event, his punishment is harsh and disproportionate to any offence of which he might be guilty.

VI. Before examining these pleas, the Tribunal would wish to restate that, in disciplinary matters the Secretary-General has a broad power of discretion. Its exercise can only be questioned if due process has not been followed or if it is tainted by prejudice or bias or other extraneous factors. The Tribunal finds, in this instance, no convincing evidence or arguments to sustain any charge of bias or prejudice. A close scrutiny of the allegations made by the Applicant himself in his letter of 20 July 1982, to the Assistant Secretary-General for Personnel Services, demonstrates that the Respondent was not influenced by any bias or prejudice or other extraneous factors. The Respondent carefully considered the various charges on at least three occasions. Taking into account all the factors, the Respondent came to the conclusion that the Applicant's conduct was unsatisfactory and imposed separation from service as a disciplinary measure.

VII. As regards the composition of and the procedure followed by the Joint Disciplinary Committee, the Applicant's contention that all the members were the Respondent's nominees, has already been commented upon by the JAB which noted that, under the regulations, such a composition was valid. The Tribunal finds from the material available in the files, that several other JDCs are, in fact, so constituted, even though the Chairman of the ECA Staff Council,

states in a letter of 20 October 1987 - long after the JDC had dealt with the present case - that "The staff representatives have always regretted the ECA administration's tendency to unilaterally establish investigating panels without prior consultation". In the same letter, it is stated that "The three members (of the JDC) were all senior to [the Applicant], they were P-5 or L-5 ... and were in a position to look for favourable personnel treatment." In the circumstances, the Tribunal holds that the composition of the JDC was not detrimental to the Applicant's interests and that it was consistent with the prevailing rules.

IX. Apart from his challenge to the composition of the JDC, the Applicant suggests that in several respects, the procedure followed by the JDC "failed to abide by requirements of due process throughout its investigation" and did not put a date on its report. The Tribunal regrets that the report is undated, but cannot find any instance in the procedure followed by the JDC where the Applicant's basic rights or the broad considerations of due process were in any way infringed.

X. As regards the JAB, the Applicant mentions that, contrary to what the JAB stated in its report, the JDC did not "undertake additional enquiries". The Tribunal finds this to be of minor significance and a matter of interpretation. The fact is that both the JAB and the JDC had examined all the major issues with care, and came to nearly identical conclusions. The Applicant complains that some of the documents were not shown to him, or not shown to him in time. This is contradicted by the Respondent. Irrespective of this dispute, the Tribunal considers that all the relevant and significant issues were thoroughly discussed by the JDC and the JAB, with the knowledge and assistance of both parties.

XI. The Applicant's grievance about the Respondent's handling of the case has many aspects. He not only complains about several documents not being shown to him, but that the Respondent was prejudiced against the Applicant and that some basic tenets of due process were not observed. The Tribunal has already indicated that it found no evidence of prejudice. As regards the plea

that due process was not followed, the Tribunal finds, that apart from the conflicting statements on whether the ECA Executive Secretary's memorandum to Headquarters was shown to the Applicant or not, all the other matters raised are not of much significance, e.g. the failure of the head of the office or mission "to inform Headquarters by cable".

XII. The Tribunal concludes that despite many minor irregularities and a regrettable major delay (aptly commented upon by the JAB), the Applicant's rights were by and large protected and that his separation was carefully considered before it was given effect by the Respondent. The Applicant apparently felt that much was due to him from ECA and that his willingness to pay back whatever he had received by his false claim regarding his children's education in Yaoundé, should close the case. The Tribunal cannot accept such a contention, nor is it able to see how an attempt to defraud can be exonerated by what the Applicant implies when he says: "It is not contrary to regulations in force to point out that the education grant advances were sought for one set of schools, but that other arrangements were forced on the Applicant for political and family reasons."

XIII. Finally, on the issue of whether the punishment is proportionate to the offence, the Tribunal takes the view that this is entirely a matter within the discretion of the Secretary-General. Each instance of disciplinary action has to be treated separately; what can be a just and adequate deterrent in one set of conditions may prove quite insufficient in other circumstances. Not only general considerations of sound administration, but the relative responsibility of the staff member concerned and all other relevant factors are to be assessed before the Secretary-General exercises his discretion.

XIV. The Tribunal finds that in the present case, the Respondent has exercised his discretion properly, that due process was substantially accorded to the Applicant and that there is no evidence of prejudice or other extraneous factors. Such delays and such deficiencies in procedure, as occurred in this case, did not, in the view of the Tribunal, inflict any significant injury on the Applicant or deflect the course of justice.

XV. For the foregoing reasons, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

New York, 20 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/584
20 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 584

Case No. 632: ADONGO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas at the request of Joshua Adongo, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 8 November 1991, the Applicant filed an application containing pleas which read, in part, as follows:

"(a) ...

(b) ... the Applicant contests the Respondent's decision not to accept the recommendation of the ad hoc Joint Disciplinary Committee following an examination of the facts of the case brought against him, the Applicant, for alleged misconduct; towit that he should lose one step within grade but that his services should be retained by the Organization; and requests that the said decision by the Respondent be rescinded;

(c) ... the Applicant requests that the Respondent be required to accept the recommendations of administrative machinery established by him under regulation 11.1 of article XI of the Staff Regulations of the United Nations.

(d) In the event that the Respondent should choose the option provided under article 9, paragraph 1 of the Statute not to rescind his decision, the Applicant, in addition to any sums paid during his suspension from duties, seeks (i) full compensation under annex III (Termination Indemnity) of the Staff Regulations of the United Nations (Rev. 21, 1991) plus, in lieu of notice, a sum of not less that one month's salary, and (ii) in compensation for the injury and anguish caused by the initial order, and subsequent upholding of that order, to dismiss him from service with the organization and consequential damage to his reputation, a sum equivalent to two years' net base salary as provided for in the Statute.

..."

Whereas the Respondent filed his answer on 12 February 1992;

Whereas the facts in the case are as follows:

The Applicant, a national of Kenya, entered the service of UNEP on 17 April 1989. He was initially offered a one year fixed-term appointment at the G-7 level, as a Junior Finance Assistant in the Finance and Budget Section. On 1 May 1990, his appointment was extended for a further year.

On 17 July 1990, the Applicant submitted to the Joint Medical Service, UNEP, a medical claim for a total of K-Sh.[Kenyan Shillings] 1,600 for medical services, allegedly rendered to the Applicant's wife, by Dr. C. K. Maringo. On 3 August 1990, the Acting Head Nurse of the Joint Medical Service informed the Chief, Personnel Services, UNEP, that since she considered those charges were too high for a general practitioner, she had decided to contact the doctor's office. After making inquiries, she found that the Applicant's wife had never been a patient at that office and that the doctor's fees were normally K-Sh.100.

On 16 August 1990, the Officer-in-Charge of the Personnel Section, UNEP, informed the Acting Assistant Executive Director of Fund and Administration, UNEP, that the Applicant had submitted a fraudulent medical claim. He recommended the termination of the Applicant's appointment, pursuant to staff regulation 9.1, as, in his view, the Applicant did not meet the highest standards of integrity required to be employed by the United Nations.

On 21 August 1990, the Acting Assistant Executive Director recommended to the Executive Director, UNEP, that the Applicant be separated from UNEP

service for serious misconduct in accordance with staff regulation 9.1. On 31 August 1990, the Executive Director approved the recommendation to dismiss the Applicant for serious misconduct.

In a letter dated 11 September 1990, the Officer-in-Charge, Personnel Section, informed the Applicant of the decision of the Executive Director to dismiss him, as of 12 September 1990, for serious misconduct in accordance with staff regulation 9.1.

On 25 September 1990, the Applicant requested the Secretary-General to review the decision and to reinstate him. On 4 October 1990, the Chief, Administrative Review Unit, Headquarters, requested the Executive Director to comment on the Applicant's request. In a reply dated 17 October 1990, the Acting Assistant Executive Director of Fund and Administration explained the events that had led to the contested decision, and noted that when "the doctor ... and the UN Head Nurse discussed the matter with Mr. Adongo, [he] very reluctantly admitted that it was a forged receipt" and that he "had not been co-operative in disclosing the identity of the person who had issued the fake receipt". The reply continued that, during a discussion with the Personnel Officer, the Applicant "regretted the incident but simply pleaded for mercy. Once again, he declined to disclose the identity of the person who had issued the forged receipt and as a result, was informed that he had committed a serious offence which would therefore be a matter for appropriate disciplinary action."

In a cable dated 16 November 1990, the Chief, Administrative Review Unit, Headquarters, informed the Officer-in-Charge, Personnel Section, UNEP, that:

> "... TERMINATION OF APPOINTMENT UNDER STAFF REGULATION 9.1 AND SUMMARY DISMISSAL FOR SERIOUS MISCONDUCT UNDER STAFF REGULATION 10.2 ARE TWO SEPARATE AND DISTINCT ADMINISTRATIVE ACTIONS AND CANNOT BE MERGED. MR. ADONGO'S CASE WAS CLEARLY A DISCIPLINARY MATTER AND COULD ONLY BE DISPOSED OF WITHIN THE PARAMETERS OF CHAPTER 10 OF THE STAFF RULES FOR WHICH THERE HAS BEEN NO DELEGATION OF AUTHORITY TO THE HEAD OF UNEP. WHILE THERE HAS BEEN A DELEGATION OF AUTHORITY FOR ACTION UNDER CHAPTER 9 OF THE STAFF RULES, CHAPTER 10 REMAINS WITHIN THE DISCRETION OF THE SECRETARY-GENERAL ALONE."

On 26 November 1990, the Acting Chief, Administrative Service, informed the Applicant that the decision to dismiss him had been reversed and that he was being reinstated as of 13 September 1990, but was being suspended from duty with full pay, pending further investigation under staff rule 110.2. On 4 March 1991, the Acting Chief, Administrative Service, informed the Applicant that the Secretary-General had decided to establish an ad hoc Joint Disciplinary Committee (JDC) to investigate his case, gave him a copy of the allegations against him and advised him of his right to seek the assistance of counsel in accordance with staff rule 110.4(a).

The ad hoc JDC adopted its report on 30 April 1991. Its recommendations read, in part, as follows:

> "V. Recommendations
>
> 21. As the Committee did not find conclusive evidence of a deliberate attempt by Mr. Adongo to defraud the Organization but found that he should have exercised due care in scrutinizing the receipt given to him by his wife, the Committee recommends that Mr. Adongo's entitlement for reimbursement of medical expenses in respect of his wife should be forfeited in accordance with article 8.2.1 of the Medical Insurance Plan.
>
> 22. In order to impress on him his responsibility vis-a-vis the Organization and the seriousness of his failure to fully assume that responsibility, the Committee further recommends that Mr. Adongo should lose one step within grade in accordance with staff rule 110.3 (a) (ii).
>
> ..."

On 29 May 1991, the Assistant Executive Director transmitted to Headquarters the report of the ad hoc JDC. He also transmitted the Executive Director's recommendation that since the Applicant did not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter, his appointment should not be extended beyond its expiration date of 30 April 1991 and his entitlement to reimbursement of medical expenses ought to be forfeited.

On 5 August 1991, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to separate him from service without compensation in lieu of notice or payment of termination indemnity.

On 8 November 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The allegation that the Applicant submitted a forged receipt in a deliberate attempt to defraud the Organization was never established.

2. The Respondent's contention that the JDC recommendations were based on a clear mistake of law is without foundation.

3. The Respondent did not take into account the cultural rules governing Kenyian society which require absolute loyalty to the immediate family.

Whereas the Respondent's principal contentions are:

1. The decision to dismiss the Applicant for fraud implemented the Charter requirement that staff have the highest standards of integrity and was thus properly taken.

2. The Applicant's dismissal was preceded by a fair hearing which fully respected his due process rights.

The Tribunal, having deliberated from 29 October to 20 November 1992, now pronounces the following judgement:

I. The only question in this case is whether the Secretary-General has correctly used his discretion. The Tribunal has never questioned the wide discretion the Secretary-General enjoys in disciplinary matters, but has always averred that it should be used with full regard to due process and be free of bias or prejudice or other extraneous factors.

II. The Applicant admits that he submitted a false medical claim in respect of his wife and on a receipt given by her. He insists that all his attempts to elicit from her how she came to obtain this obviously forged receipt and who gave it to her, have come to nothing. The Tribunal does not know if the receipt was supposed to have been given after payment to the doctor or was prepared in anticipation of reimbursement. In the former case, some questioning about how and where the payment was originally made might have elicited a reply and thrown some light on the transaction. However no enquiry was, so far as the Tribunal can determine, directed to that end.

III. The Applicant states that at the time he submitted his claim, he was not aware that the receipt was false. After he came to know that it was so, he could not let his wife down without incurring much social stigma. The Tribunal notes that irrespective of such considerations, the relationship between the Applicant and his wife was strained (they have since separated), and so it would have been difficult, in any event, for the Applicant to receive ready cooperation from his wife.

IV. The Respondent's contention is that the Applicant knowingly and deliberatly made a false claim. Had his fraud not been discovered, he would have accepted payment against the receipt and so benefited financially. In the circumstances, the Respondent considered the Applicant to be lacking the degree of probity and honesty expected of staff members.

V. Initially, the question of the Applicant's guilt was resolved by the UNEP offices at Nairobi. On a final and firm recommendation from the Acting Assistant Executive Director of Fund and Administration, to the Executive Director, UNEP, the Applicant was informed that his services with UNEP would be terminated "for serious misconduct in accordance with staff regulation 9.1. Your last working day will be 12 September 1990." The Applicant wrote to the Secretary-General protesting against this decision. UNEP was advised by Headquarters that, since this was a disciplinary case, staff rule 110.4 should apply and that an ad hoc Joint Disciplinary Committee (JDC) should be set up "for advice as to what measures, if any, are appropriate." At the same time,

the Applicant was suspended with pay from 13 September 1990, pending the result of the investigation by the JDC, established early in March 1991.

VI. The JDC report was adopted on 30 April 1991. It appears from the file that it was first considered by the UNEP Administration about the end of May 1991. In a letter dated 29 May 1991, from the Acting Assistant Director of Fund and Administration to the Director, Staff Administration and Training Division, Office of Human Resources Management, it is stated:

> "The Executive Director emphasizes that the [Applicant] does not meet the highest standards of integrity required by Article 101, paragraph 3 of the Charter and that the work of a Finance Assistant (Accountant) calls specifically for honesty and irreproachable conduct. The ad hoc Joint Disciplinary Committee failed to secure written statements from the [Applicant's] spouse who in its view was to be blamed for the incident and from the [Applicant] himself to formally confirm his oral statements to the Committee, the Chief of Personnel Section and the Chairman of the Staff Association. [The Applicant's] appointment with UNEP should, in our view, not be renewed beyond its expiry date of 30 April 1991 and his entitlement for reimbursement of the fraudulent medical receipts should be forfeited as the ad hoc Joint Disciplinary Committee had recommended."

This recommendation, on the basis of which the Secretary-General decided to separate the Applicant with effect from 30 August 1991, repeated in fact the views of those officials of UNEP who had decided, as early as August 1990, that the Applicant's services with UNEP should be terminated. This extraneous factor - the decision already taken to separate the Applicant - prevented the proper assessment and, consequently, improperly influenced the final decision of the Secretary-General.

VII. The Tribunal therefore holds that while the Respondent had undoubted discretion to accept or reject the advice given to him, his discretion was not exercised without some bias or extraneous consideration due to the manner in which this case was mistakenly handled in UNEP in Nairobi in 1990. In view of this, the Applicant is entitled to some relief and the Tribunal assesses it as three months of his net base salary, at the time of his separation from service.

VIII. Finally, the Tribunal notes that the Applicant was on a fixed-term contract, due to expire on 30 April 1991, but because of the proceedings in the JDC and the follow-up action on its report, he continued to draw full pay, while under suspension, until the end of August 1991.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the sum of three months of the Applicant's net base salary, at the time of his separation from service.

X. All other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

New York, 20 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/585
20 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 585

Case No. 516: PAPPAS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas, on 16 November 1991, Anna Mamalakis Pappas, a former staff member of the United Nations Institute for Training and Research, hereinafter referred to as UNITAR, filed an application in which she requested, under article 12 of the Statute of the Tribunal, the revision and correction of Judgement No. 500, rendered by the Tribunal on 9 November 1990;

Whereas the Applicant's pleas read, in part, as follows:

> "Applicant respectfully requests comprehensive revision of the Judgement to correct/explain/reconcile pervasive and inextricably embedded arithmetical and other errors; misstatements, wrong assumptions and premises; incongruities, irreconciliabilities, slips and omissions, gaps/lacunae in legal reasoning and adjudication; omissions involving disregard for precedent and for fundamental principles of substantive and procedural law, including black-letter law, incompleteness of relief, and failure to apply equity and dispense basic justice, all of which are, and cannot but be, accidental and inadvertent, and all of which implicate the institutional integrity of the Tribunal; and to clarify, restate and establish/hold (or explain its failure to do so) ..."

Whereas the Respondent filed his answer on 6 December 1991, in which he argued that the application for revision was not receivable by the Tribunal as it had not been submitted within the time-limit of one year from the date of the Judgement for which revision was sought, and that even if it had, the application was "in reality an attempt to re-open matters finally adjudicated upon by the Tribunal in Judgement No. 500";

Whereas the Applicant filed written observations on 30 July and 11 September 1992 and resubmitted a summary of her pleas on 26 October 1992;

On 16 November 1991, the Applicant filed with the Tribunal the application referred to earlier.

The Tribunal, having deliberated from 26 October to 20 November 1992, now pronounces the following judgement:

I. By her application of 18 November 1991, the Applicant asked the Tribunal for a revision of Judgement No. 500, dated 9 November 1990, transmitted to her on 16 November 1990. The Applicant was specifically advised by the Secretariat of the Tribunal that the one-year statutory period for the filing of a request for revision runs from the actual receipt of a copy of the judgement by the party concerned. Since the date of the letter transmitting Judgement No. 500 to the Applicant was 16 November 1990 and since 16 November 1991, fell on a Saturday, the Tribunal finds that the application filed on Monday, 18 November 1991, was on time.

II. The application seeks to obtain revision and correction of Judgement No. 500, under article 12 of the Statute of the Tribunal which reads as follows:

> "The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unkown to the Tribunal and also to the party claiming revision,

always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

III. Regarding requests for revision, the Tribunal held in Judgement No. 177, Fasla (1973), para. VI, that article 12 of its Statute "makes it possible to challenge a judgement which was given on the basis of erroneous or incomplete facts, provided that the facts invoked by the party claiming revision were unknown to the Tribunal and to that party when the judgement was given and that these facts are of such a nature as to be decisive factors."

IV. In the present case, the Applicant seeks revision of Judgement No. 500 and, at the same time, requests the Tribunal to rectify certain alleged errors and omissions of fact, alleged mistakes of law and allegedly erroneous assumptions contained in the judgement. In her conclusion to the written observations on the Respondent's answer, the Applicant asks the Tribunal "to re-examine the case in its entirety and to grant relief as requested in the pleas set forth in the application, and to grant appropriate interest on any awards made..."

V. The Tribunal wishes to comment on specific features of the Applicant's pleas. The Applicant made considerable efforts to collate numerous "matters of a predominantly factual nature" and prepared her case with assiduity. She submitted an application which extends to 49 pages, to which were added 18 pages of written observations on the Respondent's answer. Nevertheless, the Tribunal finds that the main purpose of the pleas submitted by the Applicant is merely to reargue issues involved in the proceedings which led to Judgement No. 500.

VI. In this context, the Tribunal recalls its views as expressed in Judgements No. 497, Silveira (1990), para. XV, and No. 503, Noble (1991),

para. II, that "attempts to re-argue issues already decided by judgement ... and which are res judicata" are considered to be "improper" and an "abuse" of the Tribunal's procedure.

VII. In addition, the Tribunal notes that the Applicant requested review of Judgement No. 500 by the Committee on Applications for Review of Administrative Tribunal Judgements, which considered the Applicant's case on 12 February 1991. The Committee decided, without a vote, that there was not a substantial basis for the application, under article 11 of the Statute of the Tribunal.

VIII. The Tribunal concludes that the Applicant has failed to establish, within the meaning of article 12 of its Statute, the existence of any new fact of a decisive nature unknown to her and to the Tribunal when Judgement No. 500 was rendered that would warrant revision of the judgement. Nor has the Applicant shown any clerical or arithmetical mistake in the judgement, or errors arising therein from any accidental slip or omission, that would warrant correction of the judgement.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

New York, 20 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/586
20 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 586

Case No. 608: ATEFAT

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas at the request of Bahram Atefat, a staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, the President of the Tribunal, with the agreement of the Respondent, extended to 20 March and 30 June 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 21 June 1991, the Applicant filed an application containing pleas which read, in part, as follows:

> "1. The Applicant respectfully requests the Administrative Tribunal:
>
> A. To find that the Respondent violated the implied contractual right of a United Nations staff member to fair and equitable treatment by not replying to the Classification Section's cable of 8 October 1984 requiring complete and accurate additional information for the classification of the Applicant's post ...
>
> B. To declare that duplication of United Nations substantive reports is not consistent with the highest standard of efficiency, competence and integrity, ...

C. To find that the Director of ECDC [Economic Co-operation among Developing Countries] Division acted in violation of Article 101(3) of the Charter of the United Nations and staff regulations 1.1 and 1.2 by ignoring the specific position publicly stated on behalf of Secretary-General of UNCTAD; ...

D. To find that the removal of certain ratings from the Applicant's periodic report before the Rebuttal Panel begun its investigation is a recognition of and clear evidence of initial unjustified evaluation of the Applicant's performance by the ECDC Division's Director and the Chief of M. & F. [Monetary and Financial Co-operation] Section aimed at blocking his career development.

E. To hold that ECDC Division of UNCTAD benefited from the Applicant's self-financed external studies undertaken in the interest of the United Nations with the approval of the Secretary-General.

F. ... and to order Respondent to pay the Applicant as compensation for the financial burden and the injury he sustained:

(i) a sum equivalent to two years of the Applicant's salary and post adjustment including United Nations contribution to Pension Fund and all applicable taxes while the Applicant was on leave without pay for external studies in the interest of the United Nations, or up to the limit allowed under external studies program (ST/AI/281) (...);

(ii) tuition expenses paid by the Applicant at the Graduate school of Business Administration of New York University;

(iii) round trip air transportation expenses in economy class between Geneva and New York;

(iv) a sum equivalent to two months of the Applicant's salary for the stress suffered as a result of delays in the hearing of his appeals."

Whereas the Respondent filed his answer on 24 March 1992;

Whereas the Applicant filed written observations on 29 June 1992;

Whereas, on 19 and 20 October 1992, the Applicant submitted an additional statement and further documents and on 28 October 1992, the Respondent provided his comments thereon;

Whereas, on 29 October 1992, the Applicant submitted an additional statement;

Whereas, on 30 October 1992, the Tribunal put questions to the Respondent and on 4 November 1992, he provided answers thereto;

Whereas, on 9 November 1992, the Applicant submitted comments on the Respondent's submission, and on 10 November 1992, the Respondent submitted an additional statement;

Whereas, on 14 November 1992, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCTAD on 26 April 1965, as a statistical clerk at the G-3 level. He served initially on short and fixed-terms appointments until 26 July 1965, when he was offered a probationary appointment. On 1 April 1967, he was offered a permanent appointment. On 1 June 1970, the Applicant was promoted to the P-1 level as an Assistant Economic Affairs Officer. On 1 April 1973, he was promoted to the P-2 level as Associate Economic Affairs Officer and on 1 July 1977, he was transferred to Geneva. On 1 April 1978, he was promoted to the P-3 level as an Economic Affairs Officer. The Applicant requested and was granted special leave without pay from 29 December 1980 to 22 December 1982, to pursue advanced studies at New York University, as authorized under the External Studies Programme. He resumed his functions at UNCTAD as an Economic Affairs Officer at the Division for Economic Cooperation among Developing Countries, on 23 December 1982.

On 25 October 1983, following the publication of the 1983 First Officer (P-4) Promotion Register, the Applicant instituted a recourse procedure before the Appointment and Promotion Committee (APC), asking that his name be included in the Register, but he was unsuccessful.

According to the statement of facts provided by the Joint Appeals Board (JAB) in its report, "During the 1984 promotion review, UNCTAD did not make formal recommendations to the Geneva APC for the 1984 First Officer (P-4) Promotion Register, due to post unavailability. However, it brought to the APC's attention a list of names of five staff members it considered of equal merit who would have been formally recommended had posts been available to

accommodate their promotion. The [Applicant's] name was not included in that list. It appears that the Geneva APC recommended to the Appointment and Promotion Board (APB), the inclusion of the names of the five staff members mentioned by UNCTAD and, in addition, another three, including [the Applicant's]".

While the 1984 promotion review was taking its course, the Applicant's job description was prepared and jointly signed by him and by the Director of his Division on 19 July 1984, for the purpose of establishing the level of his functions. On 6 August 1984, the Office of Personnel Services (OPS) classified the Applicant's post at the P-3 level.

Following that classification, the Applicant transmitted to the Classification Section of OPS at Headquarters, additional information concerning the nature of his functions. In a cable dated 8 October 1984, the Classification Officer, OPS, asked the Chief, Personnel Section, UNCTAD, for further information on the Applicant's post, including a review of "the job description", which would state "clearly each duty of the post and how it is assumed". He also asked for clarifications of the Applicant's functions.

On 14 November 1984, the Assistant Secretary-General for Personnel Services announced to the staff the 1984 First Officer (P-4) Promotion Register. The Applicant's name was not included. On 12 December 1984, the Applicant instituted a recourse procedure. On 3 June 1985, he was informed that it had been unsuccessful.

According to the record, on 4 July 1985, the Deputy Secretary-General of UNCTAD, wrote to Applicant's Division Director requesting that he forward a reply to the questions by the Classification Section in the cable dated 8 October 1984. According to the Respondent, on 16 July 1985, the Applicant's Division Director prepared a draft cable for transmittal to OPS. The draft cable was shown to the Applicant who did not agree with its contents and suggested amendments. The draft cable, with the changes proposed by the Applicant, was then sent to the Deputy Secretary-General of UNCTAD. He did not agree with Applicant's amendments and, in a routing slip to the Chief, Personnel Section, stated: "This is to clear ... draft, without the amendments proposed by [the Applicant]. You may wish to send the cable now". The cable, however, was never sent to the Classification Section.

On 22 November 1985, the Applicant was re-assigned to the Monetary and Financial Cooperation Section (MFCS). In a memorandum dated 25 February 1986, the Applicant wrote to the Deputy Secretary-General of UNCTAD, stating that his re-assignment to the MFCS amounted to a downgrading of duties and responsibilities. He also pointed out that UNCTAD had not responded to the cable of 8 October 1984, from the Classification Section concerning the level of his functions at his previous assignment and asked that a response be sent to OPS. According to the records of the JAB, the Deputy Secretary-General, UNCTAD, stated, in reply, on 5 March 1986, that he did not "see what purpose is to be served if a reply were sent now, particularly since you are no longer in the functions to which the job description concerned refers."

On 16 December 1985, the Assistant Secretary-General for Personnel Services announced to the staff in ST/IC/85/61 the 1985 First Officer (P-4) Promotion Register. The Applicant's name was not included. On 30 January 1986, the Applicant instituted a recourse procedure before the APC asking that his name be included in the Register. On 19 June 1986, he was informed that the recourse had been unsuccessful.

The Applicant's performance during the period 28 December 1980 through 31 July 1984, was evaluated in a performance evaluation report signed by the Deputy Secretary-General of UNCTAD and by the Applicant on 14 March 1986. On 11 April 1986, the Applicant instituted a rebuttal to this report. In his appraisal of the rebuttal and of the report of the panel constituted to investigate the rebuttal, the Secretary-General of UNCTAD concurred with the panel's view that "the value to the Organization of the [Applicant's] studies while on leave without pay, covering over fifty per cent of the reporting period, should have been recorded". He therefore decided that the following statement be included in the report: "[the Applicant's] performance has convinced me that the Division has profited in no small measure from the external studies he recently undertook in New York." He also stated that it was "regrettable that the report, due in August 1984, was completed only in March 1986. Both the [Applicant] and the Organization are entitled to timely completion of performance evaluation reports."

On 17 July 1986, the Applicant requested the Secretary-General to review the decision not to include his name in the Promotion Register. He asked for compensation "for the damages inflicted upon [him] due to

non-observance of the terms of [his] appointment." On 29 July 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that "Decisions on promotion are discretionary decisions of the Secretary-General" and that "The Appointment and Promotion bodies, being joint bodies, do not make administrative decisions, and their recommendations or non-recommendations are not therefore eligible for review under staff rule 111.2(a)."

On 22 December 1986, the Applicant lodged an appeal with the JAB. The Board adopted its report on 26 July 1990. Its decisions, conclusions and recommendation read as follows:

"Decisions, Conclusions and Recommendation

68. The Panel decides that the Appellant's claim concerning the decision not to include his name in the 1983 and 1984 First Officer (P-4) Promotion Registers is time-barred.

69. The Panel further decides that the Appellant's claim concerning the decision not to include his name in the 1985 P-4 Promotion Register is receivable.

70. The Panel concludes, in the light of the Tribunal's case-law in Upadhya, Judgement No. 401, that recommendations or non-recommendations by the APB or APC constitute administrative decisions within the meaning of staff rule 111.2(a) and therefore eligible for review under that Staff Rule.

71. The Panel further concludes that the procedures followed by the appointment and promotion bodies in reviewing the Appellant's case for promotion in the 1985 P-4 promotion exercise or the decision of the Secretary-General not to include his name in that Register were not vitiated by prejudice, breach of procedure or any other extraneous factors and, therefore, cannot be contested.

72. The Panel also concludes that it was UNCTAD's responsibility to reply to the cable of 8 October 1984 from the Classification Section concerning the Appellant's post classification.

73. The Panel further concludes that the Appellant's claim that he was denied full and proper consideration during the 1985 promotion review is lacking in substance, since he availed himself of the recourse procedure instituted for that

purpose and that the Geneva APC was in possession of all relevant facts when it reviewed the Appellant's case for promotion and decided not to include his name in the 1985 P-4 Promotion Register.

74. The Panel finally concludes that a compensation for the regrettable delay in the consideration of this case cannot be justified considering that such a delay was due to a combination of events, for which JAB was partly responsible, and actions on the part of the Appellant.

75. Accordingly, the Panel makes no recommendation in support of the appeal."

On 6 September 1990, the Under-Secretary-General for Administration and Management informed Applicant that the Secretary-General had decided, in light of the JAB's report, to maintain the contested decision and to take no further action on the matter.

On 21 June 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's assignment to different functions constituted duplication of work undertaken by other divisions of UNCTAD, and was in violation of staff regulations 1.1 and 1.2 and Article 101(3) of the Charter.

2. The Applicant's performance evaluation report for the period 1 August 1984 through 31 August 1987, was not prepared in conformity with administrative instruction ST/AI/240/Rev.1.

3. The Applicant's performance evaluation report for the period 28 December 1980 through 31 July 1984, and his job classification, essential for the consideration of his promotion, were missing, due to the negligence of the UNCTAD Administration.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeals against the decisions not to include his name in the 1983 and 1984 First Officer (P-4) Promotion Registers are time-barred.

2. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was given such consideration and the decision not to include his name in the 1985 First Officer (P-4) Promotion Register was not marred by procedural deficiencies or impropriety.

3. The Applicant's claims concerning his performance evaluation report for the period 1984 to 1987 and his work assignments within UNCTAD are not receivable.

4. In the absence of any violation of any term or condition of the Applicant's contract of employment, there is no basis for an award of compensation.

The Tribunal, having deliberated from 27 October to 20 November 1992, now pronounces the following judgement:

I. The Applicant asserts that when he resumed his duties after leave without pay from 29 December 1980 to 22 December 1982, which he had been granted to pursue external studies, the Secretary-General failed to fulfil his contractual obligations towards him under the relevant Staff Rules and Regulations. The Applicant also argues that the Respondent did not provide essential information required for the proper consideration of his case by the reviewing bodies in a timely fashion. The Applicant further alleges non-observance by the Secretary-General of the relevant provisions of administrative instruction ST/AI/240/Rev.2 of 28 November 1984, with respect to his performance evaluation reports and the rebuttal he instituted.

II. The main issue in this case concerns the non-inclusion of the Applicant's name in the 1983, 1984 and 1985 First Officer (P-4) Promotion Registers.

III. As regards the promotion review exercises for 1983 and 1984, the Applicant submitted recourses to the Appointment and Promotion Committee (APC) against his non-inclusion in the Promotion Registers for those years. The recourses were dated 25 October 1983 and 12 December 1984, respectively. Both were rejected. The Applicant was notified of the negative outcome on 2 April 1984 and 3 June 1985, respectively. The Applicant did not pursue the matter

further and only raised it again on 30 January 1986, when appealing against his non-inclusion in the 1985 First Officer (P-4) Promotion Register.

In view of these circumstances, the Joint Appeals Board (JAB) considered that the Applicant's claims concerning the non-inclusion of his name in the 1983 and 1984 First Officer (P-4) Promotion Registers were time-barred.

The Tribunal concurs and therefore will not entertain these claims.

IV. The Tribunal will only consider whether the decision by the Secretary-General not to include the Applicant's name in the 1985 First Officer (P-4) Promotion Register, upon the recommendation of the APC, violated the Applicant's rights. In this respect, the Tribunal recalls that, in accordance with its jurisprudence, a staff member can have no automatic right to promotion. The Tribunal held in Judgement No. 134, Fürst (1969), paragraph III, that "appointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same." The Tribunal is unable to find any commitment, tantamount to an obligation, on the part of the Administration concerning the Applicant's promotion.

V. The Tribunal has also held that the general rule is that promotions are at the discretion of the Secretary-General and that, consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy of promotion. (Cf. Judgement No. 312, Roberts (1987), para. II).

VI. Nevertheless, the Tribunal has consistently held that staff members are entitled to be properly considered for promotion and that failure on the part of the Administration to afford such consideration constitutes a violation of the staff member's rights and calls for compensation. (Cf. Judgement No. 266, Capio (1980)). This is the Applicant's contention in the present case. He claims that by not forwarding a new job description as requested by the APC, and also, by failing to prepare a timely and proper performance evaluation report, the Administration deprived him of his right to be properly considered for promotion by the appropriate reviewing bodies.

VII. The Applicant alleges that his rights were violated by the Administration's failure to send a reply to a cable from the Classification Section, requiring complete and accurate additional information on the Applicant's duties, as requested by the APC. The Tribunal finds that omission regrettable and considers it an inadmissible act of administrative negligence. It was UNCTAD's responsibility to reply to the cable of 8 October 1984 from the Classification Section, whether or not the Applicant agreed with the content of the reply. The Tribunal cannot but emphasize that the Administration must ensure that the prescribed procedures for the classification of posts are strictly observed in the future.

VIII. The Tribunal will not speculate on what the outcome of the Applicant's request for review of his post classification might have been if UNCTAD's reply had eventually been sent to the Classification Section. The Applicant was aware that no reply was sent by UNCTAD to the Classification Section's cable of 8 October 1984. He did not, however, pursue the matter by addressing a formal recourse to the Classification Appeals and Review Committee, in accordance with the procedures set out in administrative instruction ST/AI/277. Accordingly, the Tribunal is of the view that the non-submission of the Applicant's new job description to the APC was not exclusively the fault of the Administration. It can therefore not be concluded that the non-inclusion of the Applicant's name in the promotion register was tainted on this ground. Furthermore, even though the post might have been reclassified, the Applicant had, by then, been assigned to a different post.

IX. The Applicant also claims that the APC could not have given proper consideration to his promotion because his performance evaluation report covering the period 1980-1984 had not been prepared in a timely fashion. The Tribunal notes that the Applicant's contention is not without merit. According to information provided to the Tribunal by the Respondent, the Applicant's performance evaluation report for this period "was completed in March 1986 ... that is, almost three months before [the] Applicant's recourse procedure to the APC was finalized. [The] Applicant thus had the opportunity to highlight this new information during the pendancy of his recourse to the

APC and bring it to the attention of the APC if he thought it of relevance." The Respondent contends that it was the "Applicant's obligation to bring to the attention of the APC any additional information, such as his completed PER [performance evaluation report] for the period 1980-1984, if [the] Applicant considered such information decisive for the outcome of his recourse." The Tribunal cannot concur in this contention. It is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up-to-date, and submitted in a timely fashion. The Tribunal finds that the Applicant's right to be duly considered for inclusion in the 1985 Promotion Register was not fully respected and, as a consequence, the responsibility of the Organization is engaged.

X. The Tribunal notes that in a letter dated 7 December 1989, addressed to the Secretary-General and later communicated to the JAB, the Applicant, while complaining about the delays in the consideration of his case, stated: "I should like to amend my original case as submitted on 17 July 1986, to include the latest developments covering my second performance evaluation report [covering his period of service from 1 August 1984, through 31 August 1987] and the report of the rebuttal investigation which was sent to me only on 12 October 1989." In the same letter, he also sought the Secretary-General's agreement to submit his appeal directly to the Tribunal.

On 15 December 1989, the Applicant wrote to the Secretary of the JAB, regarding the proceedings before the JAB, stating that, if the JAB wished to consider additional information, he would "be very happy to meet such a request in writing immediately and without prejudice to my request addressed to the Secretary-General ... as contained in my letter of 7 December 1989, copy attached". He added: "I also amended my original case as submitted on 17 July 1986 to include the latest developments concerning my performance evaluation report and the report of the rebuttal investigation."

In a letter dated 19 December 1989, the Secretary of the JAB acknowledged receipt of the letter of 15 December 1989, and stated: "Your letter with attachments will be transmitted to the JAB Panel which was constituted to consider your case." On 16 January 1990, the Officer-in-Charge,

Department for Administration and Management, informed the Applicant that the Secretary-General could not agree to his request made on 7 December 1989, to submit his case directly to the Tribunal. He noted: "... Your appeal raises a number of matters which require a factual determination, for which a JAB is the appropriate body."

The Respondent in his answer dated 20 March 1992, contends that the Applicant's allegations concerning the issue of his performance evaluation report, was neither submitted to, nor considered by the JAB. Therefore, the Respondent asserts, the allegations relating to that report are not receivable. The Respondent also submits that "in any event, any complaint by the Applicant concerning his second PER [performance evaluation report] is now time-barred as Applicant did not avail himself of the appeal procedures within the time specified in staff rule 111.2(a)(ii)."

XI. The Tribunal does not concur in that conclusion. It considers that the Applicant must have assumed that the JAB would, in the light of the exchange of correspondence described above, consider all the material relating to the performance evaluation report in question and its rebuttal. The Tribunal finds that there were irregularities in the handling of the additional claims submitted by the Applicant in his amended pleas, since the Applicant was erroneously led to believe that these new pleas were before the JAB and would be properly considered.

XII. The Tribunal observes that pleas (B), (C) (D) and (E) relate to issues that were not submitted to, nor considered by, the JAB and are therefore not properly before the Tribunal.

XIII. The Tribunal notes that it took the JAB nearly four years, from December 1986, when the Applicant lodged his appeal, to 26 July 1990 for the JAB to adopt its report. It was communicated to the Applicant in September 1990. During the proceedings, the Applicant and his counsel were invited to attend five meetings to consider his case. Four of them were cancelled because of the absence of one of the members of the JAB. The Tribunal notes that the JAB, in its conclusions, admits that the delay in the consideration of the case was "regrettable" and "due to a combination of events, for which [the] JAB was partly responsible."

XIV. In this connection, the Tribunal emphasizes, as it did in Judgements No. 353, El-Bolkany (1985), para. X, and No. 414, Apete (1988), para. XIV, that an inordinate delay "not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering on an Applicant".

XV. In the light of the foregoing, the Tribunal decides that:

(1) The Applicant be paid compensation in the amount of three months of his net base salary at the rate in effect on the date of this judgement, for the damage he sustained as a result of administrative irregularities committed in connection with his case, as well as the sum of $1,000 for delays in the consideration of his case by the JAB;

(2) All other claims are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

New York, 20 November 1992

R. María VICIEN MILBURN
Executive Secretary